Nos. 19-715, 19-760

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

MAZARS USA, LLP, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

DEUTSCHE BANK AG, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the District of Columbia and Second Circuits

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BRIEF OF BIPARTISAN FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group of former members of the U.S. Senate and House of Representatives, all of whom exercised the power of inquiry that is essential to a functioning Congress.

Without robust investigatory powers, Congress could neither legislate wisely or effectively, nor discharge its duty to inquire into and publicize corruption, maladministration, or waste in government—including in the Executive Branch. *Amici* thus have a substantial interest in ensuring the continued breadth of Congress's constitutional oversight authority.

SUMMARY OF ARGUMENT

1. Judicial precedent teaches that Congress's broad (but not unlimited) power to investigate is essential to its legislative functions. Congress cannot legislate in the dark but needs the broadest range of information to make considered decisions. Sources of information have long included members of the Executive Branch and private citizens.

Precedent also teaches that Congress's power to probe and expose mismanagement in government is a critical, and independent, feature of Congress's oversight role. This "informing function" is indispensable to decision-making and political accountability in a democracy.

2. These traditional ways of governing give meaning to the Constitution and have carried great weight

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. All parties have provided blanket consent for the filing of *amici curiae* briefs or filed letters of nonparticipation in this litigation.

in the proper interpretation of the Constitution's separation of powers. History abounds with examples of congressional oversight that birthed significant legislation or exposed private illegality or misfeasance within the Executive Branch. These examples have long informed what the law is.

3. Owing to this significant historical practice, the Court has approached legal disputes over the scope of Congress's investigatory powers with judicial humility. Time and again, the Court has declined to find that Congress or its committees have exceeded the bounds of legislative power unless it is obvious that Congress has sought to exercise an exclusive function of a coordinate branch.

Thus, the Court has suggested that judicial review is complete once a valid legislative purpose for an investigation can be identified. It has been unwilling to look behind Congress's or a committee's legislative and oversight purposes, for example, to ascertain motive.

The courts below nevertheless probed Congress's actual purposes for the committees' investigations, ultimately finding that the information sought was sufficiently related to valid legislative purposes. Even under the courts of appeals' stricter standard, the subpoenas should be upheld. But there is no good reason to decline to presume that Congress's actions here were undertaken for legitimate purposes since they are capable of being so construed. Just as this Court applies a presumption of regularity to executive action, so too should it apply the longstanding presumption that congressional committees act with a legislative purpose and hence within their constitutional domain.

ARGUMENT

I. CONGRESS'S BROAD INVESTIGATORY POWER IS AN ESTABLISHED FEATURE OF THIS COURT'S SEPARATION-OF-POWERS JURISPRUDENCE.

Long ago, in the pathmarking decision of *McGrain v. Daugherty*, 273 U.S. 135 (1927), this Court recognized Congress's broad constitutional authority to investigate in aid of its legislative powers under Article I of the Constitution: "[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id*. at 174.

The Court has not wavered from that understanding. Thus, in *Barenblatt v. United States*, 360 U.S. 109 (1959), the Court recognized: "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate." *Id*. at 111. Likewise, in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), the Court again appreciated that "the power to investigate is inherent in the power to make laws because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'") *Id*. at 504 (brackets omitted) (quoting *McGrain*, 273 U.S. at 175).

And for good reason. "Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional

function wisely and effectively." *Quinn v. United States*, 349 U.S. 155, 160–61 (1955). "[I]t is often through congressional hearings and investigations that foundational ideas and insights of how to address social ills are generated. As history attests, some of the nation's most important enactments would never have materialized had Congress not had investigative powers." William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. Ill. L. Rev. 781, 799 (2004).

The Court has thus recognized Congress's wide latitude to investigate. "The scope of the power of inquiry," *Barneblatt* explained, "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." 360 U.S. at 111. "It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them." *Watkins v. United States*, 354 U.S. 178, 187 (1957). And critically: "It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Id*.

Another independent source of Congress's power to investigate is the so-called "informing function." *See* Woodrow Wilson, *Congressional Government: A Study in American Politics* 303 (1913). As then-Professor Woodrow Wilson famously observed: "'It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . The informing function of Congress should be preferred even to its legislative function.'" *Id*; *see also United States v. Rumely*, 345 U.S. 41, 43 (1953). And so, even though Congress cannot "expose

for the sake of exposure," it nevertheless can "inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government" in order to inform the public "concerning the workings of its government." *Watkins*, 354 U.S. at 200 & n.33.

The informing function plays a critical role in our democracy by fostering self-governance: "[T]he only really self-governing people is that people which discusses and interrogates its administration." Wilson, *supra*, at 303. The historian Arthur Schlesinger Jr. thus observed in the wake of Watergate: "The manner in which Congress exercises the investigative power will largely determine in years to come whether the problem posed in the 51st Federalist can be satisfactorily answered—whether the constitutional order will in the end oblige the American government to control itself." *See* Arthur Schlesinger Jr., *Introduction to the Previous Edition* in I *Congress Investigates: A Documented History*, *xx* (Roger A. Bruns et al. eds., 2011). Other scholars took the same lesson from Watergate:

> "[T]he denial of information to Congress must, finally, be regarded as a more serious threat to the balance of government than the denial of evidence to a prosecutor, because the Congress can neither legislate, nor investigate, nor impeach, if it lacks information to determine when to exercise these political powers, which ultimately are the only effective checks on a runaway Executive.

Norman Dorsen & John H.F. Shattuck, *Executive Privilege, The Congress and the Courts*, 35 Ohio State L.J. 1, 8 (1974). More recently still, a leading scholar of Congress recognized: "Beyond making laws, Congress probably does nothing more consequential than investigate alleged misbehavior in the executive

branch." David R. Mayhew, *Divided We Govern, Party Control, Lawmaking, and Investigations 1946-2002*, at 8 (Yale. Univ. Press 2005).

Courts have also recognized Congress's informing function when addressing the scope of the Constitution's Speech or Debate Clause. U.S. Const. art. I, § 6, cl.1. That provision works "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski,* 442 U.S. 477, 491 (1979); *see also United States v. Johnson*, 383 U.S. 169, 178 (1966) (Speech or Debate Clause "reinforc[es] the separation of powers so deliberately established by the Founders"). In this context, courts have found that fact-finding and information-gathering are legislative acts that enjoy speech-or-debate protection. *E.g.*, *Eastland*, 421 U.S. at 508-09; *McSurely v. McClellan*, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976) (en banc) (opinion of Leventhal, J.).

These investigatory powers, however, are not unlimited. The power to investigate "must not be confused with any of the powers of law enforcement." *Quinn*, 349 U.S. at 161. "Nor does it extend to an area in which Congress is forbidden to legislate." *Id*. "Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights . . . ." *Id*. What's more, the power to investigate "cannot be used to inquire into private affairs unrelated to a valid legislative purpose." *Id*. And lastly, Congress cannot "assume[ ] a power which could only be properly exercised by another branch of the government." *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1880).

These constraints, however, are themselves quite narrow. "At most, *Kilbourn* is authority for the proposition that Congress cannot constitutionally inquire 'into the private affairs of individuals who hold no

office under the government' when the investigation 'could result in no valid legislation on the subject to which the inquiry referred.'" *Hutcheson v. United States*, 369 U.S. 599, 613 n.16 (1962) (lead opinion of Harlan, J.). Congress can nonetheless investigate private affairs "as long as the inquiry is related 'to a valid legislative purpose.'" *Quinn*, 349 U.S. at 161. And though Congress cannot investigate merely to punish, it can investigate wrongdoing even if such conduct might otherwise reveal a crime or be the subject of criminal process. *See McGrain*, 273 U.S. at 177-78; *see also id.* at 179-80 ("Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part."). Lastly, although Congress's investigatory authority is co-extensive with its authority to enact valid legislation, there is no requirement that Congress identify future legislation "in advance." *In re Chapman*, 166 U.S. 661, 670 (1897). Nor is it necessary that Congress conclude every investigation with legislation. That is so because "[t]he very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises." *Eastland*, 421 U.S. at 509. "To be a valid legislative inquiry," then, "there need be no predictable end result." *Id*.

II. CONGRESS'S LONG HISTORY OF INVESTIGATIONS, INCLUDING OF THE PRESIDENT, SHOULD CARRY GREAT WEIGHT IN THIS COURT'S DETERMINATION OF THE SEPARATION OF POWERS.

In separation-of-powers cases, the Court has "put significant weight upon historical practice." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 524 (2014) (emphasis

removed); *see, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 400–01 (1989) ("While these [practices] spawned spirited discussion and frequent criticism, . . . 'traditional ways of conducting government . . . give meaning' to the Constitution" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., 579, 610 (1952) (Frankurter, J., concurring)).

In the seminal case of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), for example, Chief Justice Marshall wrote that "the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." *Id*. at 401. Later, in *The Pocket Veto Case*, 279 U.S. 655 (1929), the Court recognized that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions" respecting the relationship between Congress and the President. *Id*. at 689. And more recently, the Court confirmed that "the longstanding 'practice of the government' can inform our determination of 'what the law is[.]'" *Noel Canning*, 573 U.S. at 524 (citations omitted); *see generally* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019) (exploring Madison's expectation that the Constitution's meaning would be "liquidated" over time by practice).

The relevant historical touchstones for this case demonstrate a long lineage of congressional investigations into the financial affairs of individuals and businesses, including those of the President and his family, as those dealings pertain to legislative subjects such as "money-laundering, election- and national-security, disclosure, and conflict-of-interest laws." Resp. Br. 53. Those inquires have often resulted in

legislative reforms or exposed misfeasance in government with the goal of ending Executive Branch abuses. Indeed, scholars have estimated that, between 1898 and 2014, Congress held more than 4,500 hearings in the course of investigating allegations of Executive Branch misconduct. *See* Douglas L. Kriner & Eric Schickler, *Investigating the President: Congressional Checks on Presidential Power* 36 (2016).

Examples abound. From the start of the Republic,[2] Congress has investigated:

- military action, *see* Telford Taylor, *Grand Inquest: The Story of Congressional Investigations* 22-24 (1955) (recounting that President Washington, on recommendation of his Cabinet, directed that records of General St. Clair's expedition be produced to a House committee);
- corruption and self-dealing, *see* Hasia Diner, *The Teapot Dome Scandal*, *1922-24*, at 460-61, in I *Congress Investigates*, *supra* (examining Senate investigation into secret dealings between Secretary of Interior and oil companies);
- illegality, *see* Keith W. Olson, *The Watergate Committee, 1973-74*, at 886, in II Congress Investigates, *supra* (documenting Senate inquiry into break-in at Democratic headquarters, an inquiry that included testimony of high-level White House officials, such as the Chief of Staff, Assistant to the President of Domestic Affairs, and Counsel for the President);

[2] Legislative investigation and compulsory process has been traced to the English Parliament. *See generally* James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 162-63 (1926).

- multiple financial crises, *see* Donald A. Ritchie, *The Pecora Committee on the Stock Market Crash, 1933-34*, at 500-502, in I Congress Investigates, *supra* (examining extensive congressional investigation into the stock market crash of 1929, and explaining that by 1934, committee hearings "had generated 12,000 pages of testimony and more than a thousand exhibit[s]"; and with that "necessary factual base," Congress passed the Glass Steagall Act, the Securities Act of 1933, and the Securities Exchange Act of 1934, which together "added additional oversight and protection against abuses"); *see also* U.S. Senate, Permanent Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affairs, *Wall Street And The Financial Crisis: Anatomy Of A Financial Collapse*, Majority And Minority Staff Report (Apr. 13, 2011) (two-year, bi-partisan investigation into economic collapse of 2008, culminating in 750-page report based on 50 million pages of documents and 150 interviews);

- and conflicts-of-interest, *see, e.g.*, *Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate Individuals Representing the Interests of Foreign Gov'ts of the S. Comm. on the Judiciary* (Billy Carter Hearings), vol. I, 96th Cong. 510 (1980) (Senate investigation of President Carter's business and personal relationship with sibling for sibling's dealings with Libya); *id.*, vol. III, at 1666, 1706 (Senate committee obtained (among other things) sibling's financial records).

Certain of these inquires (among others) touched on "official and personal activities of Presidents and their

families throughout the Nation's history." Resp. Br. 12; *see id*. at 7-12 (collecting examples). And in many such instances, Presidents and their families or close associates have submitted to Congress's oversight. Resp. Br. 9-12 (Presidents Andrew Johnson, Carter, and Reagan).

Given the history of congressional investigations, the Court should "hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached." *Noel Canning*, 573 U.S. at 526.

III. THE COURT SHOULD APPLY THE PRESUMPTION OF VALIDITY IN DECIDING THIS CASE.

The courts below examined Congress's objectives for the investigations and found that the information sought was sufficiently related to valid legislative purposes. But this Court has been more circumspect in its judicial review. Upon finding that the subject matter of an investigation evinces a valid legislative purpose, the Court has presumed that this was Congress's "real object," *McGrain*, 273 U.S. at 178—even when, as in *McGrain* itself, the congressional resolution authorizing an investigation did not "avow" that it was in aid of legislation, *id*. at 177, and the subpoena in dispute sought information related to official conduct by a senior Executive Branch official, the Attorney General. *Id*. at 151.

The Court in *Watkins* similarly urged deference to Congress, instructing: "every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our Government." 354 U.S. at 204. Later, in *Eastland*, the Court admonished lower "courts [ ] not [to] go beyond the narrow confines of determining that

a committee's inquiry may fairly be deemed within its province.'" 421 U.S. at 506 (1975) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951)).

Consequently, "[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be *obvious* that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Tenney*, 341 U.S. at 378 (emphasis added). Otherwise, courts should not "speculate as to the motivations that may have prompted the decision of individual [committee] members" to investigate. *See Wilkinson v. United States*, 365 U.S. 399, 412 (1961). In any event, "motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." *Watkins*, 354 U.S. at 200.

This presumption of validity for congressional investigations is akin to the presumption of regularity that attends executive action. Just as the Court has required that it be obvious that a congressional investigation trespass on the exclusive functions of a coordinate branch, the Court has required "clear evidence" before it will "displac[e] the presumption [of regularity" that attends executive action. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (addressing prosecutorial discretion); *see generally* Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 Harv. L. Rev. 2431 (2018) ("When a plaintiff alleges that the government skirted procedures or acted on illicit motives, courts will sometimes 'presume' that 'official duties' have been 'properly discharged' until the chal-

lenger presents 'clear evidence to the contrary.'") (citations omitted).[3]

There is no good reason to deny Congress deference in this case. In *Mazars*, "the challenged subpoena seeks financial records totally unrelated to any of the President's official actions[.]" Pet. App. 27a. Likewise, in *Deutsche Bank*, "the challenged subpoenas seek financial records of the person who is the President, [but] no documents are sought reflecting any actions taken by Donald J. Trump acting in his official capacity as President." J.A. 230a. What's more, no party has argued that "the actual subpoenas at issue, which request records in the hands of third parties, 'impair' the President "in the performance of [his] constitutional duties." Resp. Br. 61 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 500 (2010)). Thus, even if this deferential presumption might be inappropriate to resolve disputes between coordinate branches of government where the President "carries the mantle of the Office of the President," Pet. App. 27a, this is not such a case.

Here, the subject-matter of the investigations fit neatly within Congress's longstanding legislative prerogatives over financial dealings, ethics, conflicts of interest, national security, and the like, including as such matters pertain to the Presidency. Not only are these subjects on which "legislation may be had," *Eastland*, 421 U.S. at 506, but the committees have reported or introduced several bills related to these inquiries. *See* Resp. Br. 46. Thus, because the subject

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[3] "This Note examines the Supreme Court's application of the presumption of regularity to the executive branch, but the presumption also applies to private actors and to judicial and legislative actions." *Id.* at 2432 n.9.

matter of these investigations evince a valid legislative purpose, the judicial task of determining whether Congress and its committees have acted within their constitutional domain should come to an end.[4]

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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[4] To the extent *Watkins* suggests courts should then weigh valid legislative purposes against private individual rights, such balancing would not change the outcome here, because there is no countervailing privacy interest in the financial records at issue. *See United States v. Miller*, 425 U.S. 435, 440 (1976). Even so, that balancing approach overreads *Watkins* and ignores *Eastland*, which clarified that balancing applies only in criminal cases. 421 U.S. at 491 n.16.

APPENDIX

APPENDIX

List of *Amici Curiae*— Former Members of Congress

Michael Barnes
U.S. House of Representatives (D-MD), 1979-1987

Steve Bartlett
U.S. House of Representatives (R-TX), 1983-1993

William Clinger
U.S. House of Representatives (R-PA), 1979-1997

Thomas Coleman
U.S. House of Representatives (R-MO), 1977-1993

Mickey Edwards
U.S. House of Representatives (R-OK), 1977-1993

Martin Frost
U.S. House of Representatives (D-TX), 1979-2005

Wayne Gilchrest
U.S. House of Representatives (R-MD), 1991-2009

Gary Hart
U.S. Senate (D-CO), 1975-1987

James Leach
U.S. House of Representatives (R-IA), 1977-2007

Brad Miller
U.S. House of Representatives (D-NC), 2003-2013

George Miller
U.S. House of Representatives (D-CA), 1975-2015

Christopher Shays
U.S. House of Representatives (R-CT), 1987-2009

David Skaggs
U.S. House of Representatives (D-CO), 1987-1999

Peter Smith
U.S. House of Representatives (R-VT), 1989-1991

Alan Steelman
U.S. House of Representatives (R-TX), 1973-1977

Henry Waxman
U.S. House of Representatives (D-CA), 1975-2015

Dick Zimmer
U.S. House of Representatives (R-NJ), 1991-1997